Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 76-1452

LOCKEWILL, INC.,
Petitioner,

vs.

ASSOCIATED DRY GOODS CORP., d/b/a STIX, BAER & FULLER,
THE UNITED STATES SHOE CORPORATION and
PAPPAGALLO, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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1. There is a widespread public interest involved in preserving the integrity of a proven oral contract, particularly in the expanding area of distributorship terminations. In reversing the case outright on a ground or defense not presented to or passed upon by the District Court and without evidence in the record to support the ground, the Court of Appeals acted contrary to the well established judicial principal that questions not presented to or passed upon by the trial court will not be the basis for reversal on appeal. The decision therefore conflicts with controlling decisions of this Court and other circuits including the Eighth

Circuit. In reversing outright without remand, the Court of Appeals deprived plaintiff of due process rights under the Fifth Amendment and its right to a jury trial guaranteed by the Seventh Amendment .. 12

2. The action of the Court of Appeals with respect to the matter of damages is also of considerable interest and concern to the public and to the bar since despite the jury award of compensatory damages, submitted without objection below, the Court of Appeals held that a different measure of damages (recoupment) was solely applicable and that as a matter of law, Petitioner was entitled to no damages since it had been in business over eight years and this fact alone was sufficient to establish reasonable opportunity for recoupment. A determination of whether an aggrieved distributor/franchisee has had a reasonable opportunity to recoup his initial investment and expenses on termination by the franchisor prima facie involves a consideration of other factors than mere length of time in business.

Further, the issue of reasonable opportunity for recoupment is a fact question for jury determination and the Court of Appeals' failure to remand has deprived Petitioner of a property right without due process of law in contravention of the Fifth Amendment and has further deprived Petitioner of its right to a jury trial as guaranteed by the Seventh Amendment 17

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioner prays that a writ of certiorari be issued to review the judgment entered by the United States Court of Appeals for the Eighth Circuit on December 28, 1976, which judgment became final on January 21, 1977, by the denial of a petition for rehearing on that date.

A panel of the Court of Appeals reversed the judgment of the United States District Court for the Eastern District of Missouri rendered on a jury verdict for the Petitioner in a suit brought by Petitioner against Respondents for breach of an oral franchise or distributorship contract granting Petitioner exclusive rights to market Respondents' products in the greater St. Louis, Missouri area under the trade name and style, "Pappagallo" and "The Shop for Pappagallo".

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 547 F.2d 1024, and is set forth as an appendix to this petition. The judgment of the District Court is set forth in the appendix record filed with this petition.*

GROUND OF JURISDICTION OF THIS COURT

1. The date of the judgment sought to be reviewed is December 28, 1976.

2. An order denying Petitioner's petition for rehearing was entered on January 21, 1977.

3. The statutory provision conferring jurisdiction on this Court to review the judgment by writ of certiorari is Title 28, U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. Where the sole issue, except damages, tried in the District Court was the existence and validity of an alleged oral franchise agreement for the exclusive distributorship of certain products of Respondent U.S. Shoe Corporation (defendant offering no evidence at trial); whether the action of the Court of Appeals in reversing outright the verdict and judgment in favor of Petitioner on the ground that the contract was silent as to duration and therefore terminable at will was error, because such holding was (1) based upon grounds not raised and passed upon by the jury or the trial court, and (2) not supported by the evidence adduced at the trial; and whether such reversal, without remand, deprived Petitioner of due process of law rights under

* The appendix record is cited herein as "Ap. R.".

the Fifth Amendment and the right to trial by jury guaranteed by the Seventh Amendment.

2. Whether the Court of Appeals erred in holding that recoupment or quantum meruit was Petitioner's only remedy (instead of breach of contract), and whether Petitioner was deprived of its due process of law rights under the Fifth Amendment and its right to trial by jury guaranteed by the Seventh Amendment by the Court's further holding that as a matter of law plaintiff was not entitled to damages since it had been in business over eight years and by that fact alone had been afforded a reasonable opportunity to recoup its initial investment and expenses.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portions of the constitutional provisions involved in this petition are as follows:

Article V

No person shall be . . . deprived of life, liberty or property without due process of law . . ."

Article VII

In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law.

STATEMENT OF CASE

1. Nature of Case and Its Disposition.

This litigation was instituted by Petitioner in three separate causes of action. The first cause of action, breach of an exclusive franchise agreement for the sale of women's shoes, is directed against Respondents The United States Shoe Corp. ("U.S. Shoe") and Pappagallo, Inc. Petitioner's second cause of action tortious interference with contract—or conspiracy to breach contract is brought against Respondents U. S. Shoe, Pappagallo, Inc., and Associated Dry Goods Corp., d/b/a Stix Baer & Fuller ("SBF"). Petitioner's third theory of recovery, the tort of unfair competition, was directed solely against SBF. The case was tried to a jury. At the conclusion of Petitioner's case, both sides moved for directed verdicts. The motion of Respondent SBF was granted and the motions of Petitioner and Respondents U. S. Shoe and Pappagallo, Inc. were denied. U. S. Shoe and Pappagallo, Inc., called no witnesses and renewed their motion which was again denied. The District Court refused to submit to the jury Petitioner's claims for damages, including punitive damages, based upon the alleged conspiracy among the Respondents, the alleged tortious interference by SBF with the contractual relationship and the alleged unfair competition. The District Court limited the jury's consideration to Petitioner's claims for compensatory damages for breach of an exclusive franchise contract for the sale of women's shoes. The jury found in favor of Petitioner and assessed Petitioner's damages in the amount of $150,000. Judgment was entered on the verdict. Petitioner and Respondents U. S. Shoe and Pappagallo, Inc. appealed the judgment to the United States Court of Appeals for the Eighth Circuit, which reversed the District Court as to Petitioner's claims for damages for breach of an exclusive franchise or distributorship contract and affirmed the District Court as to

its judgment for Respondents on the claims of conspiracy, tortious interference with contractual relations and unfair competition.

2. Facts.

Pappagallo, Inc. is the manufacturer of high fashion women's footwear and, at the time it entered into the agreement with Petitioner, was owned and operated by Maurice E. Bandler, Jr. (Ap. R. 298-299, 315). It was the policy of Pappagallo, Inc. to sell its shoes only for small, independent shops and not through department stores and this policy was stated to the independent shop owners with whom Pappagallo, Inc. negotiated agreements (Ap. R. 312-313, 323; Pliner Depo. Ap. R. 488-489).

From 1963 to 1969, Bandler and his assistant, Elliott Pliner, entered into verbal agreements on behalf of Pappagallo, Inc. with some 34 independent Shops for Pappagallo, including Petitioner, throughout the country (Ap. R. 300-301; Pliner Depo. Ap. R. 480-481). In order to induce the independent owners to set up a Shop for Pappagallo in their city, the shops were granted exclusive licenses to sell Pappagallo shoes in their respective areas (Ap. R. 307-308; Pliner Depo. Ap. R. 480-481). While most of these independent shops, including Petitioner, had verbal contracts, a few such shops, such as Richmond, Nashville, and Memphis had some written confirmation of their contracts (E-27, E-67, E-52; Ap. R. 329-33, 336-337; Pliner Depo. Ap. R. 483-484, 498-494).

In March, 1965, W. Grant Williams, founder of Petitioner, negotiated a verbal agreement on behalf of Petitioner with Bandler in New York, the terms of which are as follows:

> (a) Pappagallo, Inc. granted to Petitioner (through Williams) the exclusive rights to the name "The Shop for Pappagallo" and to sell Pappagallo shoes and products in the greater St. Louis area, and the right to purchase such

products at the standard wholesale rates (Ap. R. 164, 307-308), and

(b) In consideration for the above, Williams (on behalf of Petitioner) agreed:

(1) To set up, maintain and operate in St. Louis, Missouri "The Shop for Pappagallo" at his own expense, an initial investment of at least $100,000 (Ap. R. 164, 304; Pliner Depo. Ap. R. 482);

(2) To sell no footwear which competed with Pappagallo (Ap. R. 305); this requirement was modified later on account of the strike at U. S. Shoe (Ap. R. 431, 179, 365), and for anti-trust reasons (Pliner Depo. Ap. R. 492);

(3) To maintain a Pappagallo shoe inventory of about 4,000 pairs, come to New York to order Pappagallo shoes four times per year, and sell about 10,000 pairs of Pappagallo shoes per year, an inventory turnover of 2½ times (Ap. R. 304-305, 320; Pliner Depo. Ap. R. 487-488);

(4) To operate a first-class "Shop for Pappagallo" in accordance with the "oasis" Pappagallo marketing concept (Ap. R. 164-165, 301-302, 311); and

(5) To advertise and promote Pappagallo shoes and products at his own expense (Ap. R. 303, 205).

Williams sought a written contract but Bandler declined stating none was necessary and that their handshake was sufficient to bind the deal (Ap. R. 165, 231).

It was Bandler's intention that the agreement would continue on an ongoing basis as long as Petitioner maintained the above-mentioned Pappagallo standards and as long as Pappagallo, Inc. was able "to serve up an attractive assortment" of shoes (Ap.

R. 309-310). In the event that Williams violated Pappagallo, Inc.'s standards, his shop could be terminated, and in the event that Pappagallo, Inc. failed to supply the shop with adequate shoes, Petitioner could terminate. Regarding the possibility of Williams' terminating the contract, Bandler stated, "the guy is pretty well hooked. It's not too easy for him to do that." (Ap. R. 310).

Bandler further stated several times that Williams could not partially terminate; he would have to "change the name of the store", "take down the sign", and "get rid of the inventory". He "couldn't quit halfway" (Ap. R. 309-310).

According to Bandler, who left Pappagallo, Inc. in 1969, and Pliner, who left in 1971, Petitioner operated an outstanding shop at all times performing in accordance with the terms of its exclusive agreement (Ap. R. 311-312, 313, 322, Pliner Depo. Ap. R. 482, 484-485, 488). There was no evidence that Petitioner had failed to perform its agreement in any manner.

In March, 1968, Bandler sold Pappagallo, Inc. to U.S. Shoe and disclosed to Mr. Barach, President of U.S. Shoe, the existence of the exclusive agreements with the numerous independent shops, including Petitioner (Ap. R. 315-316). Bandler stayed on as President of Pappagallo, Inc. until March, 1969 (Ap. R. 172). On March 27, 1968, Bandler sent a memo to Petitioner and other independent "Shops for Pappagallo" assuring them of the continuation of the Pappagallo exclusive distribution policy (E-2, Ap. R. 171).

Following its incorporation in 1965, Petitioner remained the only store in the St. Louis area licensed to sell Pappagallo shoes and products (Ap. R. 173). Si Shanker, women's shoe buyer for SBF, a large St. Louis department shore chain, had shopped Petitioner's "The Shop for Pappagallo" several times prior to June, 1970 and believed Pappagallo would be a good line of shoes for SBF. His superiors, Messrs. Chesler and Leipsiger

shared his opinions (Ap. R. 397-398, 418). Shanker expressed SBF's interest in acquiring the Pappagallo line to U.S. Shoe in June, 1970. In a letter to Shanker dated June 29, 1970, Mel Braverman, then President of Pappagallo, Inc., refused to license SBF to open a "Shop for Pappagallo" in its St. Louis stores. Braverman told Williams the Pappagallo line would not be given to SBF (Ap. R. 177).

In March, 1973, Shanker again expressed SBF's interest in obtaining the Pappagallo line from U.S. Shoe (Ap. R. 401-402). On June 11, 1973, Chesler, a SBF Vice-President, wrote Fleming, the new President of Pappagallo, Inc., stating, "I want Pappagallo for SBF very much." (E-6; Ap. R. 402). In the summer of 1973, Fleming telephoned Williams to tell him that SBF would be given the Pappagallo line.

After obtaining full indemnification from U.S. Shoe, SBF opened "The Shop for Pappagallo" in its downtown and Westroads branches in February, 1974, copying Petitioner's name and decor (Ap. R. 186-188). The name of "The Shop for Pappagallo" was advertised by SBF in the St. Louis newspapers (Ap. R. 185-186; E-17), and shops were opened in three more St. Louis area SBF branches in the summer of 1974 (Ap. R. 186, 188, 412-413). Since February, 1974, SBF has had profitable sales of Pappagallo goods, mainly shoes, of over $300,000 (Ap. R. 426-427). The largest volume "The Shop for Pappagallo" in any St. Louis area SBF branch is at Westroads, located less than one mile from Petitioner (Ap. R. 416, 393).

From August, 1965, when Petitioner opened its shop (Ap. R. 166) to the date of trial, Petitioner's investment in "The Shop for Pappagallo" consisted of $103,570 paid-in-capital, together with $90,000 in bank loans and $32,000 in personal loans from Mr. and Mrs. Williams, or a total of $225,570 (Ap. R. 170). Petitioner spent $80,000 in advertising and promoting the Pappagallo name in St. Louis (Ap. R. 205). In addition, Petitioner

lost about $24,000 in 1972 and 1973 principally on account of strikes, design, style and distribution problems at Pappagallo, Inc. (Ap. R. 182-183, 211). Prior to that, Pappagallo, Inc. was experiencing service and delivery problems (E-4).

In 1971 one of Petitioner's best years, its net profit on Pappagallo products was only $12,000 (Ap. R. 182). Sales of Pappagallo shoes dropped in 1974 and 1975 after SBF entered the picture, although the product line was better and Petitioner expected great years.

3. **Decisions Below.**

(a) **District Court.**

At the close of Petitioner's case, Petitioner and Respondents U.S. Shoe, Pappagallo, Inc. and SBF moved for directed verdicts. The motions of Petitioner, U.S. Shoe and Pappagallo, Inc. were denied, but the motion of Respondent SBF was granted. Respondents U.S. Shoe, Pappagallo, Inc. and SBF rested, having called no witnesses and offered no exhibits (Ap. R. 456). U.S. Shoe and Pappagallo renewed their motions for directed verdicts which were again denied.

Notwithstanding the District Court's denial of motions for directed verdicts made by Respondents U.S. Shoe and Pappagallo, Inc., it refused to submit the case to the jury on Petitioner's tortious interference and unfair competition theories and refused to instruct the jury on punitive damages on the grounds that such damages are not proper in the context of tortious interference with a verbal as opposed to written contract (Ap. R. 453, 458, 121-123).

The issue of breach of an oral exclusive franchise agreement by Respondents U.S. Shoe and Pappagallo, Inc. was submitted to the jury on nine instructions (Ap. R. 464). On October 3,

1975, the jury returned a verdict for Petitioner in the amount of $150,000 (Ap. R. 470, 108). On October 10, 1975, Respondents U.S. Shoe and Pappagallo, Inc. filed a Motion for Judgment Notwithstanding the Verdict and Petitioner filed a Motion for Judgment in Accordance with its Motion for Directed Verdict. All such motions were denied by the District Court on December 3, 1975. Respondents U.S. Shoe and Pappagallo, Inc. appealed, and Petitioner cross-appealed.

(b) **Court of Appeals.**

The Court of Appeals for the Eighth Circuit, citing numerous Missouri cases, stated the applicable law of Missouri to be that where the parties to a franchise or exclusive agency or distributorship agreement which is silent as to duration and which does not deal specifically with termination begin to perform thereunder, the agreement is construed to be terminable at the will of either party. However, the Court held that there is an important limitation that the agent induced by his appointment who has in good faith incurred expense and devoted time and labor in the matter of the agency without having had a sufficient opportunity to recoup such from the undertaking is required to be compensated by the principal. Such recoupment or compensation is on a quantum meruit basis rather than by way of ordinary damages for breach of contract.

Then citing *Superior Concrete Accessories, Inc. v. Kemper*, 284 S.W.2d 482 (Mo. 1955), the Court held that by 1974, a reasonable period had expired in which Petitioner could recoup its expenses and that U.S. Shoe and Pappagallo, Inc. had the right to terminate their contractual relations with Petitioner entirely. The Court went on to hold that, even though Respondents U.S. Shoe and Pappagallo, Inc. did not terminate their relations with plaintiff entirely, they had the right unilaterally to cancel the exclusivity feature of Petitioner's distributorship, which they did do. The Court then stated that the

District Court erred in submitting to the jury the claim of Petitioner based on breach of contract.

Furthermore, even though stating in the opinion that large department stores in various cities, including SBF in St. Louis, attempted to induce U.S. Shoe to permit the opening of Pappagallo shops in their stores, the Court held that Petitioner did not make a submissible case against SBF on Petitioner's claims of conspiracy, tortious interference with contract relations and unfair competition and that the District Court properly directed a verdict in favor of SBF.

BASIS FOR FEDERAL JURISDICTION

Jurisdiction of this action was properly vested in the first instance in the United States District Court for the Eastern District of Missouri since Petitioner is a Missouri corporation maintaining its principal office and business in the Eastern Judicial District of Missouri, Respondent SBF is a Virginia corporation registered and qualified to do business in Missouri within the Eastern Judicial District of Missouri, Respondent U.S. Shoe is an Ohio corporation registered and qualified to do business in Missouri within the Eastern Judicial District of Missouri and Respondent Pappagallo, Inc. is a New York corporation doing business in the Eastern District of Missouri. The amount in controversy, exclusive of interest and costs, exceeds Ten Thousand Dollars ($10,000.00), and, therefore, the District Court below had jurisdiction under 28 U.S.C., §1332(a).

REASONS FOR GRANTING THE WRIT

1. There is a widespread public interest involved in preserving the integrity of a proven oral contract, particularly in the expanding area of distributorship terminations. In reversing the case outright on a ground or defense not presented to or passed upon by the District Court and without evidence in the record to support the ground, the Court of Appeals acted contrary to the well established judicial principle that questions not presented to or passed upon by the trial court will not be the basis for reversal on appeal. The decision therefore conflicts with controlling decisions of this Court and other circuits including the Eighth Circuit. In reversing outright without remand, the Court of Appeals deprived plaintiff of due process rights under the Fifth Amendment and its right to a jury trial guaranteed by the Seventh Amendment.

This case was tried and submitted to the jury on the *existence or nonexistence* of a valid and enforceable oral contract for an exclusive distributorship in the St. Louis market area. Dealer/distributor terminations constitute a vexatious and expanding field of litigation. The Court of Appeals affirmed the jury determination and District Court judgment that there was in fact *at least* a quasi-contractual relationship between the parties which required Respondents not to interfere with Petitioner's exclusive distributorship in the St. Louis area for a reasonable time after Petitioner opened its shop (Appendix p. A-11). The Respondents offered no evidence in the District Court (Ap. R. 456). Respondents did not assert in their post-trial motions any defense that there was in fact a contract, terminable at will, which Respondents had terminated without liability for the executory portion or prospectively (Ap. R. 109-111). Respondents' denial of the existence of any contract between the parties was also the position taken by Respondents before suit was filed (Ap. R. E-10, 11, PX-27; Ap. R. E-16, PX-32).

On appeal, for the first time, Respondents asserted a new theory of defense, to-wit: that they had effectively *terminated the contract* without liability for the executory portion (Respondents' Brief, Point II-B, pp. 36-38). The Court of Appeals recognized Respondents' position to be that the ". . . agreement . . . was never enforceable prospectively. . . ." (Appendix p. A-7), and proceeded to reverse the District Court on this basis. In so doing, the Court of Appeals overlooked or misapprehended the fact that this issue had not been presented to or passed upon by the trial court, or alternatively, it overlooked or misapprehended the well established law that such issues should not be considered on appeal as a basis for reversal. *Duignan v. United States*, 274 U.S. 195, 47 S.Ct. 566, 71 L.Ed. 996 (1927); *Hormel v. Helvering*, 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037 (1941); *Sisko v. McNutt*, 209 F.2d 550 (8th Cir. 1954).

The general rule, as stated in *Duignan v. United States, supra*, is that questions of law not presented to or passed upon by the trial court will be reviewed only in exceptional cases. This rule should be adhered to except "where the obvious result would be a plain miscarriage of justice." *Hormel v. Helvering, supra*, at p. 558. After stating these general rules, the Eighth Circuit, in *Sisko v. McNutt, supra*, stated as follows:

> "The application of the rule in this case will not produce a plain miscarriage of justice. A departure from the rule would not be justified. The defendant has his full day in court. Having made no objection to the legal theory upon which the issue of his liability was submitted to the jury, either by asking for instructions or taking exceptions to the instructions given, he is in no position to assert that the District Court committed prejudicial error in not sub-

mitting the case upon a different theory." *Id.* at pp. 553, 554.

The Eighth Circuit has applied this rule in a number of recent decisions. *Smith v. American Guild of Variety Artists*, 368 F.2d 511, 514 (8th Cir. 1966); *American General Finance Corp. v. Parkway Bank & Trust Company*, 520 F.2d 607, 608 (8th Cir. 1975), and *Hinton v. CPC International, Inc.*, 520 F.2d 1312, 1314 (8th Cir. 1975). The Eighth Circuit, and all other Appellate Courts including this one, adhere to the general and almost invariable rule that questions not called to the attention of or ruled upon by a trial court will not be reviewed on appeal.

In this case, Respondents expressly advised the trial court that they had no objection to Petitioner's measure of damage instructions submitting compensatory damages (Ap. R. 464—reference to instruction No. 9). The jury was, therefore, faced with the questions of whether there was, in fact, an enforceable oral agreement between the parties for an exclusive distributorship in the St. Louis area, whether Respondents had breached such an agreement, and the extent to which Petitioner had been damaged by such breach. By reversing the trial court upon a theory not presented to the jury, the Eighth Circuit deprived Petitioner of due process of law as guaranteed by the Fifth Amendment to the Constitution of the United States.

This is not one of the exceptional cases where this general rule should be abandoned. By confining the issues to the questions presented to the trial court, there would not be a "plain miscarriage of justice". ***Hormel v. Hulvering, supra.*** On the contrary, by basing its decision on questions not presented to the trial court, the Court of Appeals has allowed a plain miscarriage of justice to take place.

The Eighth Circuit acknowledged that it was required to view the evidence in the light most favorable to the Petitioner

and to give Petitioner the benefit of all inferences favorable to it that are reasonably deducible from the evidence (Appendix pp. A-3-A-4). However, the Court failed to view the evidence in such light in holding that the contract was terminable at will. As stated previously, Bandler indicated that Respondents' right to terminate the contract was conditioned upon an act of default on the part of Petitioner as to violation of Respondents' standards (requirements) or marketing concept. He also stated that Petitioner had no right or recourse to partial termination (Ap. R. 309, 310).

Even if the Court properly ruled as a matter of law that the contract was terminable at will, the Court nevertheless acknowledges the fact that Respondents have never terminated the contract (Appendix p. A-12) but continue to enjoy its fruits. Without citation of authority, however, the Court held that Respondents had the right to terminate the *exclusivity* feature alone and that, therefore, Petitioner's only remedy was in quantum meruit for recoupment.

Respondents' cancellation of the one unfavorable provision as to exclusivity (a partial termination) constitutes a *unilateral modification* of the agreement and the Court misapprehends the law in holding defendants had the right to do so. The general rule is that a modification is nothing but a new contract and must be supported by consideration like any other contract, 17 Am Jur 2d, Contracts § 469. To be effective, modification of an existing contract would have to encompass mutual consent and new consideration which was clearly not the case here. The applicable Missouri law is that for modification to be effective, the new agreement must possess all the elements necessary to form a new contract. *Zumwinkel v. Liggett*, 345 S.W.2d 89, 94 (Mo. 1961). Furthermore, modification is an affirmative defense which must be affirmatively pleaded and proved. *Risner v. Hubbert*, 439 S.W.2d 5 (Mo. App. 1969). The Missouri cases do not support the Eighth Circuit's ruling that Respond-

ents can affirm the contract in part and repudiate it in part, thus accepting its benefits on one hand while shirking its disadvantages on the other. *Schurtz v. Cushing*, 146 S.W.2d 591, 594 (Mo. 1940).

As authority for its ruling, the Eighth Circuit relies on *Red-E-Gas v. Meadows*, 360 S.W.2d 236 (Mo. App. 1962). In that case, plaintiff gas company in 1957 changed one of the terms of a written agreement, terminable at will, by requiring the defendant distributor to purchase the propane gas cylinders in addition to the gas (*id.* at p. 238). The Court held this was not a partial termination but a breach of the contract and was actionable by way of counterclaim for loss of profits from 1957 until the contract was *entirely* terminated in 1960. If that Court had ruled as the Eighth Circuit did in the case at bar, then the distributor would have had no actionable claim. Thus, the opinion does not correctly apply Missouri law.

At the very least, Petitioners should be allowed a new trial because the issue of whether a contract has been terminated is a jury question even when the contract in question is terminable at will. *Taussig, Day & Co., Inc. v. Poleman*, 228 S.W.2d 722, 727-728 (Mo. 1950), cited in WILLISTON, § 1107a, p. 157, n. 3.

The Court of Appeals action discussed above deprived plaintiff of an opportunity to present its claims for loss and damage to his business and his investment therein and effectively deprived him of property without due process of law within the meaning and intendment of the Fifth Amendment to the Constitution of the United States. See generally, *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 681 (1929).

In addition, the decision of the Court of Appeals has effectively and permanently barred plaintiff from asserting his claims in Court and thus deprived him of his right to a trial by jury

guaranteed by the Seventh Amendment to the Constitution of the United States. See generally, *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358 (1962).

2. The action of the Court of Appeals with respect to the matter of damages is also of considerable interest and concern to the public and to the bar since despite the jury award of compensatory damages, submitted without objection below, the Court of Appeals held that a different measure of damages (recoupment) was solely applicable and that as a matter of law, Petitioner was entitled to no damages since it had been in business over eight years and this fact alone was sufficient to establish reasonable opportunity for recoupment. A determination of whether an aggrieved distributor/franchisee has had a reasonable opportunity to recoup his initial investment and expenses on termination by the franchisor prima facie involves a consideration of other factors than mere length of time in business.

Further, the issue of reasonable opportunity for recoupment is a fact question for jury determination and the Court of Appeals' failure to remand has deprived Petitioner of a property right without due process of law in contravention of the Fifth Amendment and has further deprived Petitioner of its right to a jury trial as guaranteed by the Seventh Amendment.

The Court below held that the agreement between Petitioner and Respondents was binding, at least quasi-contractually, upon Respondents for a reasonable time after Petitioner had opened its shop in 1965 "to the end that plaintiff might have a reasonable opportunity to recover its initial investment and expenses." (Appendix p. A-11). The Court went on to hold, however, that "reasonable men could not differ" that by early 1974 such a reasonable time or period had expired and that therefore Petitioner suffered no legal wrong when Respondent changed its marketing policy. (Appendix p. A-12).

This holding overlooks material facts in the record. From the time Petitioner opened its shop to the trial date, Petitioner's investment in the Shop for Pappagallo, consisting of paid-in-capital, bank loans and personal loans, totalled $225,570 (Ap. R. 170). Petitioner spent $80,000 in advertising and promoting the Pappagallo name in the St. Louis area (Ap. R. 205). Petitioner's financial statements show that Petitioner's original investment was about $100,000 and that the additional $125,000 was added in numerous increments over the years. Thus, while the time period for recovery of the initial $103,570 was almost 8½ years, it had much less time to recover the additional $125,000. In addition, Petitioner lost approximately $24,000 in 1972 and 1973 on account of strikes, design, style, and distribution problems at Pappagallo, Inc. (Ap. R. 182-183, 211). In one of Petitioner's best years, 1971, its net profit on Pappagallo products was only $12,000 (Ap. R. 182). Furthermore, sales of Pappagallo shoes dropped in 1974 and 1975 after SBF entered the picture, although the product line was better and plaintiff expected a great year (Ap. R. 202).

As mentioned above, Respondents acquiesced in the submission to the jury below of an instruction (No. 9) awarding compensatory damages (Ap. R. 464).

Notwithstanding the above-referenced evidence, the Court ruled as a matter of law and without regard to the particular facts of the case that reasonable men could not differ that Petitioner had had a reasonable opportunity to recover its initial investment and expenses. In this regard, the Court has utilized a *time only* standard which is unduly restrictive and narrow and directly inconsistent with other Eighth Circuit decisions and with the decisions of other Circuits.

In *McGinnis Piano & Organ Co. v. Yamaha International Corp.*, 480 F.2d 474, 480 (8th Cir. 1973), the plaintiff's franchise was found to be terminable at will, but the plaintiff was awarded damages to recoup its investment. The plaintiff had operated its franchise for six years, and the defendant argued that this constituted a reasonable time for the plaintiff to recoup its investment. The Court held:

> "We disagree, however, with Yamaha's contention that six years constituted a reasonable time, *as a matter of law* for McGinnis to have recouped its investment. The evidence with respect to the difficulty in building sales in early years and the investment by McGinnis in time and money in building the franchise was sufficient to require that the question of reasonable duration be submitted to the jury." (emphasis added)

Ag-Chem Equipment v. Hahn, Inc., 480 F.2d 482, 488 (8th Cir. 1973) (Appendix p. A-9), also involved a franchise which was terminable at will. Again, this Court rejected defendant's argument that a six or seven year period was sufficient to preclude recoupment by the terminated franchisee:

> "Hahn's second argument . . . that Ag-Chem had had more than a reasonable opportunity to recover its investment prior to termination, presents a troublesome question as Ag-Chem had enjoyed the franchise and the emoluments flowing therefrom from 1962 through 1968. Nonetheless, in view of the fact that the distributorship required a *continual investment*, we are not persuaded to rule *as a matter of law* that it had endured for a reasonable time." (emphasis added)

As in *Ag-Chem*, Petitioner's investment in the case at bar was a continual one.

The third case is *Clausen & Sons, Inc. v. C. Hamm Brewing*, 395 F.2d 388 (8th Cir. 1968). There the plaintiff had performed from 1950 to 1963, a period of 13 years, under an

oral exclusive distributorship contract. The Court denied the defendants' motion for summary judgment. *Clausen* certainly indicates that a question of fact is presented as to a reasonable opportunity to recoup a terminated dealer's investment, even though where that period is admittedly 13 years long.

In addition to conflicts with other Eighth Circuit decisions, this opinion also conflicts with the other decisions of other circuits interpreting Missouri law. For example, in *P.S. & E., Inc. v. Selastomer Detroit, Inc.*, 470 F.2d 125 (7th Cir. 1972), the Seventh Circuit followed the rule of *Beebe v. Columbia Axel Co.*, 117 S.W.2d 624, 629 (Mo. App. 1938). The Court quoted the same language from *Beebe* as quoted in the opinion of the Court below (Appendix p. A-10) for the proposition that even where the contract is terminable at will, the franchisee may recoup its investment on a *quantum meruit* basis. Notably, the Seventh Circuit stated at p. 129:

> "That in any event, the jury must determine, regardless of whether the contract was terminable at will, whether the plaintiffs suffered damages as the result of incurring expense and devoting time and labor in the matter of the agency without being afforded a sufficient opportunity to recoup from the undertaking, as required by Fargo."

The opinion of the Court below appears to base its holding upon the following quoted language from *Superior Concrete Accessories, Inc. v. Kemper*, 284 S.W.2d 482, 492 (Mo. 1955):

> "In view of the return to *Kemper* under the agreement shown by the record, and the fact that this agreement has been in effect for more than 12 years at the time of the trial of this case, we are of the opinion that the trial court correctly found that *Kemper* has had a reasonable and ample opportunity to recover the amounts invested by him pursuant to the agreement . . ."

Kemper was a declaratory judgment action tried to the Court and there was a finding of fact that the terminated distributor had earned the same amount in commissions equal to his total investment. Thus, in *Kemper* there was recoupment in fact. In the case at bar, recoupment has not been achieved. Since recoupment can only come from *profits*, the loss of which the jury found in the amount of $150,000, and since Respondents have virtually conceded that the amount was reasonable, the jury has already decided recoupment damages and the evidence conclusively shows Petitioner's recoupment damages to be at least this amount.

Petitioner has thus been deprived of property rights contrary to the due process requirements of the Fifth Amendment, *Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra.* Petitioner has also been deprived of its right to a jury trial on the issue of damages, *Atlantic & Gulf Stevedores, Inc.*, supra.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of the Eight Circuit.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
for the Eighth Circuit

No. 76-1099

Lockewill, Inc.,

Appellee,

v.

The United States Shoe Corp. and Pappagallo, Inc.,

Appellants.

No. 76-1025

Lockewill, Inc.,

Cross-Appellant,

v.

Associated Dry Goods Corp., d/b/a Stix, Baer & Fuller, The United States Shoe Corp. and Pappagallo, Inc.,

Cross-Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

Submitted: October 12, 1976

Filed: December 28, 1976

Before Lay, Ross and Henley, Circuit Judges.

Henley, Circuit Judge.

This is an appeal and cross-appeal from a judgment of the United States District Court for the Eastern District of Missouri which was in one respect favorable to the plaintiff but which in other respects was favorable to the defendants. Jurisdiction of the district court was properly based on diversity of citizenship with the requisite amount in controversy. The case was tried to a jury. At the conclusion of plaintiff's case both sides moved for directed verdicts. The motion of plaintiff, Lockewill, Inc., was denied. The motion of the defendants, United States Shoe Corp. (U. S. Shoe) and Pappagallo, Inc. (Pappagallo), was likewise denied. The motion of the defendant, Associated Dry Goods Corp., Stix, Baer & Fuller Division, was granted. U. S. Shoe and Pappagallo called no witnesses and renewed their motion which was again denied.

Although the motions of U. S. Shoe and Pappagallo were denied, the district court refused to submit to the jury certain claims of the plaintiff and limited the jury's consideration to the claim of plaintiff that it was entitled to compensatory damages for breach of an alleged exclusive franchise or distributorship contract for the sale of fashionable women's shoes and other items of apparel and ornament from an establishment known as "The Shop for Pappagallo" located in or near the City of St. Louis, Missouri. The district court refused to submit to the jury plaintiff's claims for damages, including punitive damages, based on an alleged conspiracy among the defendants, including Stix, Baer & Fuller (SBF), alleged tortious interference by SBF with the contractual relationship between plaintiff and the other defendants and alleged unfair competition.

On the limited submission to it, the jury found in favor of the plaintiff and assessed plaintiff's damages in the sum of $150,000.00. Judgment was entered on the verdict. Thereafter, U. S. Shoe and Pappagallo filed a motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial. That motion was denied, and this appeal followed.

On their direct appeal U. S. Shoe and Pappagallo do not complain of the amount of the verdict. They do contend that their motions for a directed verdict should have been granted or that the district court should have granted their motion for judgment notwithstanding the verdict or should at least have granted a new trial.

On its cross-appeal plaintiff contends that the district court erred in directing a verdict in favor of SBF and in refusing to submit to the jury its other claims that have been mentioned.[1] Plaintiff also contends that the district court erred in excluding *in limine* certain evidence that plaintiff claims was relevant in connection with its claim of bad faith on the part of U. S. Shoe and its claim for punitive damages. And plaintiff finally contends that the district court erred in denying discovery with respect to certain documentary material.

The position of SBF is simply that the district court acted correctly when it directed a verdict in favor of SBF at the close of plaintiff's case.

Although the contract in suit was made in New York, and although the contract was to be performed partially in New York, both sides proceeded in the district court and have proceeded here on the theory that the rights of the parties are governed by the substantive law of Missouri. We will accept the parties' choice of law which certainly is not an impermissible one.

As far as the appeal of U. S. Shoe and Pappagallo is concerned, we are required to view the evidence in the light most favorable to the plaintiff and to give to the plaintiff the benefit of all inferences favorable to it that are reasonably deducible

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[1] One of plaintiff's claims that we have not mentioned was for injunctive relief. The district court did not submit that claim to the jury and did not grant that relief. The propriety of the district court's rulings in that regard is not questioned here.

from the evidence. When that approach is taken, we think that the jury could have found from the evidence and evidently did find substantially the following facts:

As is well known, women's shoes and other items of merchandise designed and sold under the brand name "Pappagallo" have been fashionable and much in demand. Prior to 1968 this merchandise was manufactured or distributed at wholesale by Pappagallo, Inc., a New York corporation having its principal place of business in the City of New York. For a number of years all of the stock in the corporation was owned by its president, Maurice Bandler. In 1968 all of the stock in the corporation was acquired by U. S. Shoe, and thereafter Pappagallo, Inc. became a division of U. S. Shoe. However, it has retained its business identity. Mr. Bandler ceased to be connected with the operation in 1969. He was succeeded as president by Melvin Braverman; Mr. Braverman in turn was succeeded by Ben Ross; and Mr. Ross was finally succeeded by Frank Fleming who was still in charge of Pappagallo's operations when this suit was filed in 1974 and when it was tried in 1975.

Traditionally Pappagallo products have been sold to consumers at retail from relatively small stores, each of which is known as "The Shop for Pappagallo." These stores are uniquely and attractively designed, and in merchandising and advertising much stress is laid on the word "Pappagallo."

As long as Mr. Bandler owned the stock in Pappagallo and for some years after he sold his stock to U.S. Shoe, the retail outlets were separately owned and were non-competing; that is to say, there was only one Pappagallo Shop in each city or trade area. And it was the policy of Pappagallo not to permit its products to be sold in large department stores like SBF.[2]

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[2] SBF is one of the largest department stores in St. Louis. Its principal store is located on Washington Avenue in downtown St. Louis, but it has a number of additional outlets in that city and in shopping centers in the suburbs.

Plaintiff is a Missouri corporation which was organized in the spring of 1965 by Grant Williams, a man experienced in the shoe business, after he had made an oral contract with Mr. Bandler in March, 1965. After that contract was made, the rights and liabilities incident to it passed informally to the plaintiff corporation which Williams controls.

Williams first became interested in the Pappagallo operation when he observed a Pappagallo shop in Washington, D. C. while on a business visit to that city in late 1964 or early 1965. For the purpose of obtaining a Pappagallo franchise for the St. Louis area he met with Bandler in New York in March, 1965. As a result of that meeting, which was highly informal, Williams and Bandler entered into the contract involved in this case and under which Pappagallo and the corporate plaintiff performed for nearly nine years.

The agreement was that if Williams would at his own expense open and equip a Shop for Pappagallo in the St. Louis area, and if he would maintain it and operate it satisfactorily, and if he would purchase shoes in reasonable volume from year to year, he would be given an exclusive right to market Pappagallo products in that area and appropriately to make use of the Pappagallo trade name and good will. In the course of the conversation between Williams and Bandler the former placed an initial order for several thousand pairs of shoes.

Unfortunately, the agreement between the two men was not reduced to writing. At one point in the conference Williams inquired of Bandler about the propriety of a written contract, but Bandler, although a lawyer, assured Williams that no writing was necessary, and that their handclasp was sufficient to bind the deal.

The agreement was silent as to its duration and nothing was said about the right of either side to terminate the arrangement either with or without notice or with or without cause. More-

over, it does not appear that either side covenanted to remain in business permanently or for any particular period of time.

After the conference in New York, Mr. Williams returned to St. Louis, formed his corporation, invested about $100,000.00 in the venture and opened for business in May, 1965. Thereafter and down through the years plaintiff bought and paid for large quantities of Pappagallo merchandise. Apparently, Pappagallo was satisfied with the performance of plaintiff, and plaintiff was satisfied with the performance of Pappagallo.

By about 1970 and after Bandler had ceased to be connected with Pappagallo, large department stores in various cities, including SBF in St. Louis, began to try to induce U. S. Shoe to permit the opening of Pappagallo shops in their stores. Naturally, the operators of existing outlets, including plaintiff, protested, contending that to permit the products to be sold by or in department stores would infringe upon their exclusive franchises and also would destroy the very marketing concept which had made the Pappagallo brand famous and dealings in merchandise bearing that brand profitable.

For a substantial period of time U. S. Shoe-Pappagallo refused to permit department stores to sell the merchandise in question in competition with locally owned Pappagallo shops. However, by the summer of 1973 an arrangement had been made under the terms of which SBF would be permitted to open Pappagallo shops in a number of its department stores in and around St. Louis.

In September, 1973 counsel for plaintiff wrote a joint letter to the president of SBF and to the president of Pappagallo warning them that the contemplated arrangement would violate the rights of plaintiff, and that should the arrangement be implemented, plaintiff would commence action to vindicate and preserve its alleged rights.

Pappagallo evidently had taken or took the position that plaintiff had no exclusive rights in the St. Louis area, or at least that Pappagallo knew of no such rights. However, in view of the letter from plaintiff's counsel, SBF refused to proceed further unless the other defendants provided it with satisfactory indemnity should it turn out that the plaintiff was correct in its position.

SBF was provided with a satisfactory indemnity agreement, and in February, 1974 SBF opened a number of Shops for Pappagallo in its stores in and around St. Louis, and this suit was promptly filed.

The SBF shops began to sell goods in direct competition with plaintiff, and the jury was justified in finding that plaintiff sustained substantial losses in sales and profits from the SBF competition. Under the instructions of the district court, the jury's award was based on lost profits, including future profits.

As far as the record shows, plaintiff has never ceased to operate its Shop for Pappagallo at the same location and under the same name, nor has it ever ceased to sell Pappagallo products. Plaintiff is not suing U. S. Shoe and Pappagallo for any breach of that portion of the contract which involved sales of goods by those defendants to plaintiffs. The position of the plaintiff is that when U. S. Shoe and Pappagallo permitted SBF to open Shops for Pappagallo in its stores, those defendants breached the exclusivity provision of plaintiff's distributorship contract.

The position of the defendants is that for a number of reasons the agreement between Williams and Bandler was never enforceable prospectively, and that plaintiff is not entitled to recover anything on the basis of that contract or a breach thereof.

Contracts for exclusive franchises or distributorships have been developed to meet the needs of modern manufacturing and distribution. *Bendix Home Appliances, Inc. v. Radio Accessories Co.*, 129 F.2d 177, 181 (8th Cir. 1942). They are dis-

cussed in considerable detail in WILLISTON ON CONTRACTS, 3d ed., § 1017A.[3] In one aspect, such a contract is one for the future sale of goods; in another aspect, it is a contract of agency or factorage. In view of the dual nature of such a contract it is not necessary for its validity that it require the franchisee or distributor to buy any particular quantities of goods; he is expected to order what he needs and can sell. WILLSTON, *op. cit.*, pp. 139-40; *C. C. Hauff Hardware, Inc. v. Long Mfg. Co.*, 136 N.W.2d 276 (Ia. 1965); *Bendix Home Appliances, Inc. v. Radio Accessories Co., supra.*

Suits by franchisees against franchisors alleging wrongful terminations or cancellations of franchises are by no means rare and have produced a great number of reported decisions, many of which are collected in an exhaustive annotation entitled "Termination By Principal of Distributorship Contract Containing No Express Provision for Termination," 19 ALR3d 196, and the protection of franchisees from improper terminations by franchisors is the specific problem discussed in § 1017A of WILLSTON.

As might be expected, the results reached by the courts have not been harmonious. Results have been influenced by underlying concepts of contract law, by characterizations of particular contracts in suit, by the provisions, if any, of the contracts with regard to termination, and the facts and circumstances of particular cases. In some cases legal or equitable relief, or both, has been granted; in other cases relief has been denid.

As the annotation cited above makes clear, relief has been denied in some cases on the theory that the contracts before the court were terminable at will from their inception, that the promises, if any, of the distributors were illusory, and that the manufacturers or franchisors were for that reason not required

[3] In an earlier edition of WILLISTON that section appeared as § 1027A.

to perform prospectively. In other cases the view has been taken that the contracts although valid initially were terminable at will by the distributor or by the manufacturer, or by either, and that the manufacturer could exercise his right without incurring liability to the distributor.

In WILLSTON, *supra*, it is said that the problem may present itself to a court in any one of five conventional situations: (1) where the duration of the contract is fixed; (2) where a determinable time is fixed on one side only; (3) where the contract is completely silent as to termination; (4) where the contract is definite as to duration but reserves to one side a right of prior cancellation; and (5) where the contract fixes no definite period of duration but specifies that one or both parties may cancel at will or upon notice, or upon written notice, or for designated cause, or for dissatisfaction.

We have here the third situation, and the view expressed in WILLISTON is that the contract is binding on the manufacturer for a reasonable period of time after which it may be cancelled upon notice. The purpose of the notice is to allow the distributor a reasonable opportunity to arrange his affairs. WILLSTON, *op. cit.*, pp. 150-52, and cases cited. See also *C. C. Hauff Hardware, Inc. v. Long Mfg. Co., supra; Ag-Chem Equipment Co. v. Hahn, Inc.*, 480 F.2d 482 (8th Cir. 1973) (applying Minnesota law).

The law of Missouri, which we are undertaking to apply in this case, appears to be that where the parties to a franchise or exclusive agency or distributorship agreement which is silent as to duration and which does not deal specifically with termination begin to perform thereunder, the agreement is construed to be terminable at the will of either party. *See Superior Concrete Accessories v. Kemper*, 284 S.W.2d 482 (Mo. 1955); *Want v. Century Supply Co.*, 508 S.W.2d 515 (Mo. App. 1974); *Red-E-Gas Co. v. Meadows*, 360 S.W.2d 236 (Mo.

App. 1962); *Beebe v. Columbia Axle Co.*, 117 S.W.2d 624 (Mo. App. 1938).

That general rule, however, is subject to an important limitation which was expressed in *Beebe, supra,* in the following language (117 S.W.2d at 629):

> The limitation is that, in any case of an indefinite agency where it is revoked by the principal, if it appears that the agent, induced by his appointment, has in good faith incurred expense and devoted time and labor in the matter of the agency without having had a sufficient opportunity to recoup such from the undertaking, the principal will be required to compensate him in that behalf; for the law will not permit one thus to deprive another of value without awarding just compensation. The just principle acted upon by the courts in the circumstances suggested requires no more than that, in every instance, the agent shall be afforded a reasonable opportunity to avail himself of the primary expenditures and efforts put forth to the end of executing the authority conferred upon him and that, if such opportunity is denied him, the principal shall compensate him accordingly. (Citations omitted.)

In a case to which the limitation of the general rule is applicable, the agent is entitled to recoupment or to compensation on a quantum meruit basis rather than by way of ordinary damages for breach of contract. *Gibbs v. Bardahl Oil Co.*, 331 S.W.2d 614 (Mo. 1960); *Glover v. Henderson,* 25 S.W. 175 (Mo. 1894); *Want v. Century Supply Co., supra,* 508 S.W.2d at 516-17.

In *Superior Concrete Accessories, Inc. v. Kemper, supra,* the parties entered into their contract in 1941, and it provided that it should continue in effect until cancelled by mutual agreement. The parties performed under the contract for a number of years after which the manufacturer brought suit for a declaratory

judgment to the effect that it was entitled to cancel the agreement at will. The manufacturer prevailed in the trial court, and the franchisee appealed.

For reversal, the franchisee contended primarily that the contract was of perpetual duration. Alternatively, it was contended that the agreement should be held binding for a reasonable period of time so that the franchisee could recover its investment. Both contentions were rejected.

In dealing with the franchisee's alternative contention, the court first recognized the limitation on the rule that a contract of indefinite duration is terminable at the will of either party. The court thereafter said (284 S.W.2d at 492):

> In view of the return to Kemper under the agreement shown by the record, and the fact that this agreement had been in effect for more than twelve years at the time of the trial of this case, we are of the opinion that the trial court correctly found that Kemper has had a reasonable and ample opportunity to recover the amounts invested by him pursuant to the agreement in the promotion of the business of respondent.

Applying to this case the principles of Missouri law that have been mentioned, we hold that apart from any question of the statute of frauds, which was pleaded by the defendants, the agreement between plaintiff and Pappagallo was binding, at least quasi-contractually, on Pappagallo and later on U. S. Shoe for a reasonable time after plaintiff had opened its shop in May, 1965, to the end that plaintiff might have a reasonable opportunity to recover its initial investment and expenses. During that period of time Pappagallo and U. S. Shoe were required to supply goods to the plaintiff and to refrain from interfering with his exclusive distributorship in the St. Louis area.

However, we are convinced that reasonable men could not differ on the proposition that by late 1973 and early 1974 such

a reasonable time or period had expired, and that U. S. Shoe and Pappagallo had the right to terminate their contractual relations with plaintiff entirely, which they did not do, or to cancel the exclusivity feature of plaintiff's distributorship, which they did do when they permitted SBF to open Shops for Pappagallo in its stores.

And, we are convinced that plaintiff suffered no legal wrong when U. S. Shoe and Pappagallo finally implemented a change in marketing policy which had evidently been in contemplation for some years.

It is true that plaintiff was not given any formal or written notice of what the defendants intended to do. However, it is evident that at least by late September, 1973 plaintiff had received actual notice of what was in the wind, and there is nothing to indicate that plaintiff sustained any loss or damage by the fact that it was not given formal notice. It will be remembered that the contract said nothing about termination and naturally there was no requirement of formal notice of cancellation.

It follows that the district court erred in submitting to the jury the claim of plaintiff based on breach of contract. It should have directed a verdict in favor of U. S. Shoe and Pappagallo on all of the claims of the plaintiff and should have entered judgment in favor of those defendants on all of the claims.

Plaintiff's cross-appeal may be disposed of briefly. We are satisfied that plaintiff did not make a submissible case against SBF on plaintiff's claims of conspiracy, tortious interference with contract relations, and unfair competition, and that the district court properly directed a verdict for and entered judgment in favor of SBF.

Other issues raised by the cross-appeal do not survive our determination of the principal appeal and our holding that a verdict in favor of SBF was properly directed.

As far as U. S. Shoe and Pappagallo are concerned, the judgment of the district court is reversed and the cause remanded for further proceedings not inconsistent with this opinion. The judgment of the district court in favor of SBF is affirmed.

Reversed and remanded on direct appeal. Affirmed on cross-appeal.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

United States Court of Appeals
for the Eighth Circuit

76-1025 September Term, 1976

Lockewill, Inc., etc.,
Appellant,

vs.

Associated Dry Goods Corp., etc., et al.,
Appellees.

76-1099

Lockewill, Inc., etc.,
Appellee,

vs.

The United States Shoe Corp., etc., et al.,
Appellants.

Appeals from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellee-appellant Lockewille and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

January 21, 1977

Supreme Court, U. S.
FILED
MAY 18 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 76-1452

LOCKEWILL, INC.,

Petitioner,

v.

ASSOCIATED DRY GOODS CORP., d/b/a STIX, BAER & FULLER, THE UNITED STATES SHOE CORPORATION and PAPPAGALLO, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

In this dispute over an alleged oral contract for the sale of women's shoes in a shop in Ladue, Missouri, involving an interpretation of Missouri law, where federal jurisdiction is based solely on diversity of citizenship, there is nothing to excite the attention of our nation's highest court.

The petition for certiorari should be denied.

QUESTIONS PRESENTED

In an effort to interest the Supreme Court of the United States in this otherwise mundane litigation, the petitioner has phrased its questions in a manner cleverly designed to suggest constitutional issues, where none exist.

1. It is not the case, as suggested by the petitioner, that the issues upon which the Court of Appeals acted in reversing the judgment of the District Court were not raised at

the time of trial. The Court of Appeals, in reversing the District Court, simply held that in light of all the evidence presented by the petitioner, a directed verdict should have been granted on respondents' motion because reasonable minds could not differ that respondents were entitled to judgment as a matter of law. Rule 50, Federal Rules of Civil Procedure, does not conflict with the Seventh Amendment to the Constitution of the United States.

2. The Court of Appeals correctly held the law of Missouri to be that a contract, indefinite in its duration, was terminable at the will of either party; that this general principle of law was modified only to the extent that a distributor who had invested money in good faith on the strength of an oral promise of a distributorship of indefinite duration, could be assured that the distributorship would continue long enough to permit the distributor an *opportunity* for recoupment of his investment. The issue is not, as suggested by petitioner, whether there was actual recoupment, but only whether there had been a sufficient *opportunity* for recoupment. The Court of Appeals examined this issue thoroughly and found that the petitioner was not entitled to a new trial on the issue of *opportunity*.

CONSTITUTIONAL PROVISIONS INVOLVED

There are no constitutional provisions involved in this action.

COUNTERSTATEMENT OF FACTS

In this counterstatement of facts, petitioner will sometimes be referred to by its corporate name "Lockewill", and respondents sometimes by their respective corporate names "U. S. Shoe" and "Pappagallo".

Petitioner's Statement of Facts is misleading. Respondents deem it important to distinguish those "facts" set forth in the petition for certiorari which are not based on

evidence in the record, from the facts as shown from the testimony and exhibits admitted in evidence, and to point out to the court where petitioner has engaged in flights of fancy:

1. On page 5 of the petition, Lockewill says that "in order to *induce* the independent owners to set up a Shop for Pappagallo in their city, the shops were granted exclusive licenses to sell Pappagallo shoes in their respective areas." (Emphasis added.) There is nothing in the record cited by Lockewill (Ap. R. 307-308) which talks about "inducement", nor in fact is there any fair inference of "inducement" from anything that is in the record. Indeed, the record is clear that far from there being an inducement, Williams (petitioner's president) sought out Pappagallo in the first place (Ap. R. 162).

2. In the last full paragraph of the petition, beginning at the bottom of page 5, Lockewill says that "in March 1965, W. Grant Williams, founder of petitioner, negotiated a verbal agreement on behalf of petitioner with Bandler (Pappagallo's former president) in New York, the terms of which are as follows: . . . ." Lockewill then proceeds to outline, in a neat package on the bottom of page 5 and the top of page 6 of its petition, the terms of the alleged agreement as though Williams and Bandler sat down together, negotiated and agreed upon a clear unambiguous oral agreement with consideration flowing from both sides, and all of the obligations of the parties clearly negotiated and spelled out. A reading of the transcript, nevertheless, reveals that there was no such neat package.

The entire summarization by Lockewill of supposed testimony is a deliberate distortion of the actual testimony, in an attempt to avoid the legal conclusion, which must be drawn from the fair reading of the testimony, that the contract between Lockewill and Pappagallo was terminable

at will. The actual nature of the vague, loose business methods used by Bandler and Williams is obvious from the transcript of Bandler's testimony about his arrangement with Williams about termination and duration:

> Mr. Cole [counsel for petitioner] . . . :
>
> Let me say it a different way. What was the duration of your arrangement with the independent shop owner?
>
> A. I understand what you're objecting to. With regard to the Williams, duration is a two-way street. They were told that as long as they maintained the standards we spoke about at the outset, they could continue. They also could quit any time they liked. Any time they weren't happy with the arrangement, all they had to do was take down the sign, forget about it. We won't sell them any more shoes.
>
> Further, if by my standards they violated the general concept, I'd tell them to take down the signs and they wouldn't get any more shoes. Probably illegal, but not fattening.
>
> So that they could quit any time they wanted, change the name of the store and carry ham sandwiches. At the same time, I'd assured them that it was my intention to serve up an attractive assortment, periodically, that would be acceptable to them but there again, if they weren't satisfied, they couldn't quit halfway, stay or go. That's the best answer I can give you with regard to duration. Not in terms of days, months and years. . . .
>
> Mr. Cole: . . .
>
> Essentially, as long as they met your requirements and performed in accordance with your standards, was it your understanding and agreement that you would continue to supply them with the shoes and observe this exclusive right that you have testified to?
>
> A. I'll stand on the answer I have given already.
>
> Q. What was the term of your agreement with Mr. Williams?

> A. As I have stated, the term was a two-way street. As far as Mr. Williams is concerned, he could quit any time. All he had to do was take down the sign, get rid of the inventory he had the best he could, and we just wouldn't sell him any more. He could quit any time. Open end as far as he was concerned. . . .
>
> (Ap. R. 309-310)

The absence of any agreement between Bandler and Williams about duration is exemplified by Williams's own testimony (Ap. R. 230, 232-233):

> Q. Now, in your conversations with Mr. Bandler, I think you said that you talked about opening the shop. Did you have any conversation about how long the shop would be in existence?
>
> A. Mr. Bandler said that as long as I performed to what he wanted me to do and as long as he performed what he had to do for me, that I could have The Shop For Pappagallo.
>
> * * * * *
>
> Q. And you had this conversation with Mr. Bandler. For how long did you say the contract was to last?
>
> * * * * *
>
> Q. Were there any years put is what I'm asking you, any time put on it?
>
> A. None.
>
> * * * * *
>
> Q. And there was neither a second nor a millenneum mentioned by either you or Mr. Bandler?
>
> A. No.

It is clear that there was no agreement about duration.

3. At the bottom of page 8 of the petition, Lockewill says that it made a total investment of $225,570, referring to Ap. R. 170. Reference to Ap. R. 170 will show that there is no such total mentioned; that the testimony of expenditures is not at all clear; but that the paid in capital was $103,570. Lockewill's attempt to inflate the apparent size of its capital investment is certainly not justified.

DECISIONS BELOW

The Court of Appeals, viewing the evidence in the light most favorable to petitioner and giving the petitioner the "benefit of all inferences favorable to it that were reasonably deducible from the evidence" (A. 3-4), said (A. 5-6):*

> As a result of that meeting, which was highly informal, Williams and Bandler entered into the contract involved in this case and under which Pappagallo and the corporate plaintiff performed for nearly nine years.
>
> * * * * *
>
> The agreement was silent as to its duration and nothing was said about the right of either side to terminate the arrangement either with or without notice or with or without cause. Moreover, it does not appear that either side convenanted to remain in business permanently or for any particular period of time.

Most importantly, the Court of Appeals said (A. 7):

> As far as the record shows, plaintiff has never ceased to operate its Shop for Pappagallo at the same location and under the same name, nor has it ever ceased to sell Pappagallo products. Plaintiff is not suing U. S. Shoe and Pappagallo for any breach of that portion of the contract which involved sales of goods by those defendants to plaintiffs. The position of the plaintiff is that when U. S. Shoe and Pappagallo permitted SBF to open Shops for Pappagallo in its stores, those defendants breached the exclusivity provision of plaintiff's distributorship contract.

The Court of Appeals found the law of Missouri to be that where the parties to a franchise, or exclusive agency, or distributorship agreement, which is silent as to duration, and which does not deal specifically with termination,

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* The opinion of the Court of Appeals is attached to Petitioner's Brief as an appendix. Reference to that opinion is, hereafter, simply "A. —".

begin to perform under the contract, the agreement is construed to be terminable at the will of either party. The Court of Appeals, nevertheless, found an exception in Missouri law: if it appears that the distributor has in good faith incurred expense, or devoted time and labor in setting up the distributorship, without having had a sufficient *opportunity* to recoup his investment, the franchisor or manufacturer will be required to compensate the distributor for the investment. In the case at bar, the Court of Appeals held that, as a matter of law, reasonable men could not differ on the proposition that by late 1973 and early 1974 such a reasonable period of time had been given the petitioner for the *opportunity* to recoup its investment, and that by that time (A. 12):

> . . . U. S. Shoe and Pappagallo had the right to terminate their contractual relations with plaintiff entirely, which they did not do, or to cancel the exclusivity feature of plaintiff's distributorship, which they did do when they permitted S.B.F. to open shops for Pappagallo in its stores.
>
> And, we are convinced that plaintiff suffered no legal wrong when U. S. Shoe and Pappagallo finally implemented a change in marketing policy which had evidently been in contemplation for some years.

REASONS FOR NOT GRANTING THE WRIT

1. There Is No Widespread Public Interest Involved in This Case. The Area of Distributorship Terminations Is Well Defined by Missouri Law and the Court of Appeals for the Eighth Circuit Correctly Applied That Law. There Was Ample Evidence in the Record to Support the Findings and Decision of the Court of Appeals That the Oral Contract Was Indefinite in Duration and in Fact Was Terminated. There Are No Constitutional Issues Involved in That Finding or Decision.

The Missouri law on the subject of contracts terminable at will is well settled. The Court of Appeals correctly

applied the law, and nothing in that law, nor its application, warrants review by the Supreme Court of the United States. See *Superior Concrete Accessories* v. *Kemper*, 284 S.W.2d 482 (Mo. 1955); *Want* v. *Century Supply Co.*, 508 S.W.2d 515 (Mo. App. 1974); *Red-E-Gas Co.* v. *Meadows*, 360 S.W.2d 236 (Mo. App. 1962); *Beebe* v. *Columbia Axle Co.*, 117 S.W.2d 624 (Mo. App. 1938); *Gibbs* v. *Bardahl Oil Co.*, 331 S.W.2d 614 (Mo. 1960); *Glover* v. *Henderson*, 25 S.W. 175 (Mo. 1894).

It is *not* true, as stated on page 13 of petitioner's brief, that "on appeal, for the first time, respondents asserted a new theory of defense, to-wit: that they had effectively terminated the contract without liability for the executory portion." The Court of Appeals held that the oral contract was one of indefinite duration and under Missouri law was terminable at the will of either party. Petitioner's own evidence demonstrated that the contract had in fact been terminated. This termination was subject only to the reasonable limitation of affording the petitioner an *opportunity* for recoupment. This did not change the basic proposition, urged by respondents in their pleadings and at the trial, that it was a contract terminable at will. See, for example, Defendants' Amended Answer, paragraph 25 (Ap. R. 37); Defendants' Motion for Directed Verdict, Count II, paragraph 5 (Ap. R. 101); Defendants' Motion for Judgment Notwithstanding the Verdict, paragraph 5 (Ap. R. 110); Defendants' Proposed Converse Verdict Director, paragraphs (b) and (e) (Ap. R. 116); Defendants' Additional Proposed Written Interrogatories (to the jury), paragraph 6(a) (Ap. R. 120); Defendants' statement to the District Judge (Ap. R. 443, last paragraph).

Since the Missouri law is that a contract indefinite in duration is terminable at will, subject only to the right of

the distributor to have an opportunity for recoupment, once the petitioner proved the existence of an oral contract of indefinite duration, it was up to the petitioner to prove that it had not had a reasonable opportunity for recoupment. It was the petitioner's burden to establish and prove the case within Missouri law. It failed to do so. It was not respondents' burden to anticipate petitioner's claims. Therefore, when the respondents made a motion for directed verdict, the District Court should have granted it. That is what the Court of Appeals held in reversing the District Court.*

Petitioner argues that *Duignan* v. *United States*, 274 U.S. 195, 47 S.Ct. 566, 71 L. ed. 996 (1927), and *Hormel* v. *Helvering*, 312 U.S. 552, 61 S.Ct. 719, 85 L. ed. 1037 (1941), support its view that the Court of Appeals should not have reversed the District Court and remanded the case for judgment in accordance with its opinion. Petitioner has misinterpreted both of these cases. In the *Duignan* case, for the first time, on appeal, the defendant challenged the equity jurisdiction of the court. In the *Hormel* case, involving whether certain trust income was taxable to the petitioner, the Court of Appeals *did* pass on questions not raised below and the Supreme Court upheld its right to do so.

Respondents' theory in this case has always been that there was no contract because the vague arrangement made by Williams and Bandler was indefinite in duration and thus terminable at will; it was void because it lacked

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* The cases cited by petitioner at pages 18-19 of its brief, *McGinnis Piano & Organ Co.* v. *Yamaha International Corp.*, 480 F.2d 474 (8th Cir. 1973), *Ag-Chem Equipment* v. *Hahn, Inc.*, 480 F.2d 482 (8th Cir. 1973), and *Clausen & Sons, Inc.* v. *Theo. Hamm Brewing*, 395 F.2d 388 (8th Cir. 1968), are inapposite. *McGinnis*, *Ag-Chem* and *Claussen* all concerned Minnesota law, not, as here, Missouri law.

mutuality of obligation; it was void because it was vague, indefinite, and uncertain; it was void under the Missouri Statute of Frauds. All the facts necessary for an adjudication on any of these grounds, including the facts on termination, were before the District Court at the time the respondents moved for a directed verdict and, for a judgment notwithstanding the verdict. Therefore, for petitioner to state that the respondents advanced a new theory of defense in the Court of Appeals for the first time, is not in accord with the record in this case.

Moreover, petitioner should not be "allowed a new trial because the issue of whether a contract has been terminated is a jury question even when the contract in question is terminable at will." (Petitioner's brief p. 16.) It is, of course, a jury question only if there's a disputed fact. When respondents started selling their shoes to S.B.F., that, as a matter of law, terminated the exclusivity feature of the petitioner's alleged contract. Petitioner knew about the termination. Williams, petitioner's president, testified that in the summer of 1973 he received a phone call from Pappagallo's president stating "they were going to put the shoes in Stix, Baer & Fuller". (Ap. R. 183) That, in fact, was a termination of the exclusivity feature of the contract.

Petitioner appears to argue in the alternative that even if respondents could have terminated the entire contract, they were without power to modify the contract unilaterally. The respondents did not "modify" the alleged contract. What the respondents did, according to the Court of Appeals, was to terminate any agreement concerning exclusivity. Of course, petitioner continued to market Pappagallo products and what remained was an ordinary commercial relationship, consisting of a series of executory contracts for the purchase and sale of shoes. This relationship still continues between the parties.

Where a contract is terminable at will, there is no continuing contract. Each order for women's shoes, accepted, becomes a completed contract. The arrangement, so long as it continues, remains merely a series of completed contracts of purchase and sale. *Campbell* v. *American Handle Co.*, 94 S.W. 815 (Mo. App. 1906).

Petitioner urges that its constitutional right to a jury trial has been abridged by the action of the Court of Appeals in reversing the District Court, and argues that the Court of Appeals should have remanded the case for a new trial.

This court answered that argument in *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 18 L. ed.2d 75, 87 S.Ct. 1072 (1967), by saying (18 L. ed.2d, p. 80):

> The question here is whether the Court of Appeals, after reversing the denial of a defendant's Rule 50(b) motion for judgment notwithstanding the verdict, may itself order dismissal or direct entry of judgment for defendant. As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n. o. v. than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n. o. v. See *Baltimore & Carolina Line, Inc.* v. *Redman*, *supra*. Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment n. o. v. on appeal. Section 2106 of Title 28 provides that, "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

2. The Action of the Court of Appeals with Respect to the Matter of Damages Is of No Considerable Interest or Concern to the Public. The Petitioner Failed to Prove Damages Required by Missouri Law. It Cannot Now Complain Because of Its Own Failure of Proof. Whether a Distributor Had an Opportunity for Recoupment Can Be a Question of Law.

Petitioner argues that the holding of the Court of Appeals, that reasonable men could not differ that by early 1974 the time for the opportunity of petitioner to recoup its initial investment had expired, was erroneous. On page 18 of its brief, petitioner purportedly quotes "material facts in the record" which it alleges were overlooked by the Court of Appeals. Petitioner's quotation of "facts" is in error. There is absolutely no evidence that petitioner's initial investment was $225,570. As pointed out in this brief on page 5 in paragraph 3, petitioner's initial investment was about $100,000. The fact that some $125,000 in additional funds may have been expended by the petitioner over the years, as suggested on page 18 of petitioner's brief, does not mean that the $125,000 was an investment in the business, and the record (Ap. R. 170) does not so indicate. The Court of Appeals correctly interpreted the evidence (A. 6), and found that Williams had invested only about $100,000 in Lockewill, not $225,570.

But no matter what amount petitioner spent or invested in the beginning, certain facts remain uncontroverted: that petitioner was at the time of the trial, and still is, in the business of selling women's shoes and other accessory items in Ladue, Missouri; that at the time of trial petitioner did, and still does, purchase women's shoes from respondents, and that some of its initial capital investment must, of necessity, be allocated to its continuance in business.

All that the Court of Appeals held was that this was a contract terminable at will, and that the respondents' right

to terminate it was limited by an important proviso: that respondents would be required to compensate the petitioner for any initial capital expenditure which petitioner had made, but which it had not had the *opportunity* to recoup. This did not change the respondents' right to terminate. What the Court of Appeals held was that as a matter of law, nearly nine years of exclusive distributorship was enough to afford the petitioner the *opportunity* for that recoupment. The cases cited by petitioner on pages 18 and 19 of its brief do not hold differently.

CONCLUSION

The petition for certiorari should be denied: there is no issue of important public interest; there is no constitutional question; there is no federal question; and the Court of Appeals correctly applied Missouri law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served three true and correct copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari upon John J. Cole, attorney for petitioner, by depositing the same in the United States mail, postage prepaid by air mail, addressed to him at 611 Olive Street, Suite 1950, St. Louis, Missouri 63101, this 17 day of May, 1977; and I further certify that all parties required to be served have been served.

Attorney for Respondents